



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF: SR-6J

**SPECIAL NOTICE LETTER
URGENT LEGAL MATTER
PROMPT REPLY NECESSARY
CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

February 2, 2015

Rich Whitting, Chief Executive Officer
Flexible Foam Products, Inc.
200 East North Street
Spencerville, OH 45887

Re: Special Notice Letter for the Lusher Street Groundwater Contamination Site,
Operable Unit 1 Interim Remedy, Elkhart, Elkhart County, Indiana

Dear Mr. Whitting:

This letter follows the general notice letter that the U.S. Environmental Protection Agency (EPA) previously sent to you in connection with the Lusher Street Groundwater Contamination Site (the "Site"), located in Elkhart, Indiana. In that letter, U.S. Environmental Protection Agency (EPA) notified you of your potential responsibility under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA or "Superfund"), 42 U.S.C. § 9607(a), for the cleanup of the Site, including all costs incurred by EPA in responding to releases at the Site. EPA is now contacting you in a further attempt to resolve your responsibility at the Site.

This letter serves three basic functions. First, it contains a formal demand for reimbursement of costs that have been incurred, including interest thereon, and that are expected to be incurred, which are subject to interest, in response to the health and environmental concerns at the Site. Second, this letter notifies you that a 60-day period of formal negotiations with the EPA for reimbursement of costs and for performance of remedial action automatically begins with this letter. Third, this letter provides general and site-specific information to assist you in these negotiations.

Background

Based on an extensive review of records related to the release and/or disposal of hazardous substances at the Site, EPA identified you as one of 12 potentially responsible parties (PRPs) that contributed to releases of hazardous substances at the Site. Under the federal Superfund law, you

and the other PRPs at the Site are responsible for the costs of cleaning up the Site. EPA has selected an interim cleanup approach for the Site, which is described in a document called a Record of Decision (ROD) issued by EPA on September 16, 2014 and available at: <http://www.epa.gov/region5/cleanup/lusher/>.

Special Notice and Negotiation Moratorium

EPA has determined that use of the special notice procedures set forth in Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), may facilitate a settlement between you, other PRPs, and EPA for implementation of the response action. Under Section 122(e), this letter triggers a sixty (60)-day moratorium on certain EPA response activities at the Site. During this 60-day moratorium, EPA will not begin response action at the Site. However, EPA reserves the right to take action at the Site at any time should a significant threat to the human health or the environment arise.

During this 60-day period, you and the other PRPs are invited to participate in formal negotiations with EPA in an effort to reach a settlement to conduct or finance the response action at the Site. The 60-day negotiation period ends on **April 3, 2015**. The 60-day negotiation moratorium will be extended for an additional sixty (60) days if PRPs provide EPA with a “good faith offer” to conduct or finance the response action and reimburse EPA for its costs incurred to date. If EPA determines that your proposal is not a “good faith offer,” you will be notified in writing of EPA’s decision to end the moratorium. If the moratorium is extended for an additional 60 days, negotiations will conclude on **June 2, 2015**. If a settlement is reached between EPA and the PRPs within the 120-day negotiation moratorium, the settlement will be embodied in a Consent Decree for Remedial Design/Remedial Action. When approved by EPA and the U.S. Department of Justice (DOJ), the Consent Decree will then be lodged in federal court, and will be subject to public comments and approval by the Court.

If a “good faith offer” is not received within sixty (60) days, or a timely settlement cannot be reached, EPA may take appropriate action at the Site, which may include either of the following options: (1) EPA may fund the remedial action and pursue a cost recovery claim under 107 of CERCLA against you and/or the other PRPs; or (2) EPA may issue a Unilateral Administrative Order (UAO) to you and/or the other PRPs under Section 106(a) of CERCLA, 42 U.S.C. § 9606, requiring you and/or them to perform the work described in the ROD. If the recipients of a UAO refuse to comply with the UAO, EPA may pursue civil litigation against the recipients to require compliance.

Good Faith Offer

A proposed Consent Decree (Enclosure 2) and Statement of Work (Enclosure 3) are enclosed to assist you and other PRPs in developing a “good faith offer¹.” As indicated, the 60-day negotiation

¹ This draft Consent Decree is not currently binding on EPA and is subject to revision and approval by EPA and DOJ. It is based on the model RD/RA Consent Decree (September 29, 2014), which is available at <http://www2.epa.gov/enforcement/guidance-2014-cercla-rdra-cd-and-sow>

moratorium triggered by this letter is extended for 60 days if the PRPs submit a "good faith offer" to EPA. A "good faith offer" to conduct or finance the remedial action is a written proposal that demonstrates the PRPs' qualifications and willingness to perform such work and includes the following elements:

- A statement of willingness and financial ability to implement the requirements of the ROD and proposed Consent Decree and Statement of Work, and that provides a sufficient basis for further negotiation;
- A demonstration of technical capability to carry out the remedial action, including identification of the firm(s) that may actually conduct the work or a description of the process that will be undertaken to select the firm(s);
- A detailed statement of work or work plan identifying how you intend to proceed with the remedial action;
- A statement of willingness to reimburse EPA for costs EPA will incur in overseeing your implementation of the remedial action;
- A response to the proposed Consent Decree and Statement of Work. If your offer contemplates modifications to the Consent Decree and Statement of Work, please make revisions or edits to the documents and submit a version showing your proposed modifications as a redline/strikeout version in Microsoft Word;
- A list identifying each party on whose behalf the offer is being made, including name, address, and telephone number of each party; and
- The name, address, and phone number of the party who will represent you in negotiations.

Demand of Reimbursement of Costs

With this letter, EPA demands that you reimburse EPA for its costs incurred to date, and encourages you to voluntarily negotiate a consent decree in which you and other PRPs agree to perform the RD/RA.

In accordance with Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has already taken certain response actions and incurred certain costs in response to conditions at the Site. These response actions include: provision of groundwater well filters and municipal water hookups, investigation and identification of PRPs, preliminary site investigations and remedial investigation/feasibility study, and development of the interim remedial action. EPA is seeking to recover its response

costs at the Site and all the interest authorized to be recovered under Section 107(a) of CERCLA from you and other PRPs. To date, the approximate total unreimbursed response costs identified through October 31, 2014 for the Site are \$5,781,724.94. Under Section 107(a) of CERCLA, EPA hereby makes a demand for payment from you and other PRPs for the above amount plus all interest authorized to be recovered under Section 107(a). A summary of these costs is enclosed as Enclosure 4. As indicated above, EPA anticipates expending additional funds for the RD/RA. Whether EPA funds the entire RD/RA, or simply incurs costs by overseeing the parties conducting these response activities, you are potentially liable for these expenditures plus interest.

Some or all of the costs associated with this notice may be covered by current or past insurance policies issued to you or predecessor companies. Most insurance policies will require that you notify your carrier(s) of a claim against you in a timely manner. To evaluate whether you should notify your insurance carrier(s) of this demand, you may wish to review current and past policies. Coverage depends on many factors, such as the language of the particular policy and state law.

In the event that you file for protection in a bankruptcy court, you must include EPA as creditor because EPA has a potential claim against you. EPA reserves the right to file a proof of claim or application for Reimbursement of Administrative Expenses.

PRP Steering Committee

To assist PRPs in negotiating with EPA concerning this matter, EPA is enclosing a list of the names and addresses of other PRPs to whom it is sending this Notice (Enclosure 1).

EPA recommends that all PRPs meet to select a steering committee responsible for representing the group's interests. EPA recognizes that the allocation of responsibility among PRPs may be difficult. If PRPs are unable to reach consensus among themselves, we encourage the use of the services of a neutral third party to help allocate responsibility. Third parties are available to facilitate negotiations. At the PRPs' request, EPA will provide a list of experienced third-party mediators or help arrange for a mediator.

Administrative Record

In accordance with Section 113 of CERCLA, 42 U.S.C. § 9613, EPA has established an Administrative Record containing the documents that serve as the basis for EPA's selection of the appropriate response action for the Site. This Administrative Record is located at the EPA Region 5, Superfund Records Center, 7th Floor, 77 West Jackson Blvd, Chicago, IL 60604-3590 and is available to the public for inspection and comment. The Record Center is open Monday – Friday, 8 am – 4 pm. The Administrative Record is also available for inspection and comment at the Elkhart Public Library, Reference Services, 300 S. Second Street, Elkhart, IN 46516. You may wish to review the Administrative Record to assist you in responding to this letter, but your

review should not delay such response beyond the 60-day period provided by CERCLA.

PRP Response and EPA Contact Person

You are encouraged to contact EPA by **February 20, 2015** to indicate your willingness to participate in future negotiations concerning this Site. You may respond individually or through a steering committee if such a committee has been formed. If EPA does not receive a timely response, EPA will assume that you do not wish to negotiate a resolution of your liabilities in connection with the Site and that you have declined any involvement in performing the response activities.

Your response to this Special Notice Letter and the demand for costs included herein, including written proposals to perform the remedial action selected for the Site, should be sent to:

U.S. Environmental Protection Agency, Region 5
Syed Quadri, Remedial Project Manager Superfund Division (SR-6J)
77 W. Jackson Blvd, Chicago, Illinois 60604-3590
Quadri.Syed@epa.gov

The factual and legal discussions in this letter are intended solely to provide notice and information, and such discussions are not to be construed as a final EPA position on any matter set forth herein. Due to the seriousness of the environmental and legal problems posed by the conditions at the Site, EPA urges that you give immediate attention and prompt response to this letter.

In addition, EPA has notified the Federal Natural Resource Trustee of its intention to perform or enter into negotiations for the performance of response actions at the Site.

Resources and Information for Small Businesses

As you may be aware, the Superfund Small Business Liability Relief and Brownfields Revitalization Act contains several exemptions and defenses to CERCLA liability, which we suggest that all parties evaluate. You may obtain a copy of the law at <http://www.epa.gov/brownfields/laws/index.htm> and review EPA guidances regarding these exemptions at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

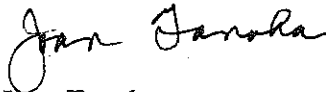
EPA has created a number of helpful resources for small businesses. EPA has established the National Compliance Assistance Clearinghouse as well as Compliance Assistance Centers which offer various forms of resources to small businesses. You may inquire about these resources on the Agency's website at <http://www.epa.gov>. In addition, information on contacting EPA's Small Business Ombudsman is available at <http://www.epa.gov/sbo>. Finally, EPA developed a fact sheet about the Small Business Regulatory Enforcement Fairness Act (SBREFA), which is enclosed with this letter (Enclosure 5).

If you have any questions regarding the technical aspects of this letter, please contact Syed M. Quadri, Remedial Project Manager, at 312-886-5736, or by e-mail at Quadri.Syed@epa.gov. If you have an attorney handling your legal matters, please direct his or her questions to Thomas

Krueger, Associate Regional Counsel, at 312-886-0562, or by e-mail at Krueger.Thomas@epa.gov.

My staff and I look forward to working with you during the coming months.

Sincerely,



Joan Tanaka
Chief, Remedial Response Branch 1
Superfund Division

Enclosures

1. List of Respondents
2. Proposed RD/RA CD
3. Statement of Work
4. Itemized Cost Summary
5. SBREFA Fact Sheet

cc: John M. Davis, State Natural Resources Trustee
Beth Admire, State Natural Resources Trustee

cc (w/encl): Prabhakar Kasarabada, IDEM
Lisa McCoy, IDEM
Lindy Nelson, Department of Interior
Todd Gocks, NOAA